

ADDITIONAL DISSENTING VIEWS - CONGRESSWOMAN ZOE LOFGREN

When I worked on the impeachment proceedings against President Richard M. Nixon as a staffer, I was in awe of the proceedings, of the responsibility, of the effort, of the decorum of the members of Congress engaged in that solemn undertaking.

I observed men and women struggle to overcome party differences and loyalties in order to do what was fair and right, in the interest of the nation, in honor of its history, and as guardians of its future. I believe that's why the country respected the actions taken by the 1974 Congress. An inferior performance could have destroyed our system of government. Instead, public men and women rose up to become statesmen and stateswomen in a difficult hour.

Since before the referral of the Independent Counsel, I have encouraged my colleagues to read the 1974 Judiciary Committee staff report, which sets forth the Constitutional grounds for impeachment adopted by the House in 1974. It is against this constitutional standard that I have measured the conduct of this President. The 1974 Report instructed us that:

"Not all presidential misconduct is sufficient to constitute grounds for impeachment. There is a further requirement – substantiality. . . . Because impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of the Presidential office."

When our Founding Fathers drafted the provisions in our Constitution regarding impeachment and wrote the phrase, "treason, bribery, or other high crimes and misdemeanors," they were concerned with wrongdoing directed against the state. Treason is a crime against the state. Bribery is a crime against the state – an attempt to corrupt the administration of the state. During the Constitutional convention, in addition to treason and bribery, George Mason and James Madison added the phrase "high crimes and misdemeanors," to the grounds for impeachment. Their purpose was to allow impeachment to save our democracy from other "great and dangerous offenses," which a Chief Executive might commit

to subvert our constitutional form of government.

The founders were well aware of the tyranny of the Crown, so they established the process of impeachment as a legislative safety valve against a tyrannical executive. The founders designed this safety valve for abuses so grave that, in Franklin's words, they suggested assassination as a remedy. Impeachment was the founders' civilized substitute. Under our Constitution, since impeachment is a remedy for Presidential tyranny, only acts of tyranny can justify impeachment. That may explain why, after more than two centuries' experience in our democracy, not a single President has been removed and only one has been impeached.

It is clear that the Founders did not want the President to serve at the pleasure of the Congress. That is why they rejected a proposal that the President be impeached for "maladministration" because that would be equivalent, according to Madison, "to a tenure during the pleasure of the Senate." That lesser standard would have unbalanced our constitutional system of checks and balances, and created an unstable parliamentary system rather than the stable system we presently enjoy. Unlike so many other countries with parliamentary systems, we don't suffer from a rapid succession of governments, one after another, as votes of no confidence drive out prime ministers who hardly have time to govern before they are removed by votes of no confidence.

Alexander Hamilton reaffirmed the jurisdictional scope of impeachment in Federalist No. 65 when he wrote that "the subjects of [the Senate's impeachment] jurisdiction are those offenses which proceed from the misconduct of public men, or in other words from the abuse of the violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done to the society itself."

In 1974, Yale Law Professor Charles Black wrote a primer on impeachment. Pointing out that plainly, not all regular crimes were impeachable, Professor Black wrote:

"Suppose a president transported a woman across a state line or even (so the Mann Act reads) from one point to another within the District of Columbia, for what is quaintly called an "immoral purpose.

... Or suppose the president actively assisted a young White House intern in concealing the latter's possession of three ounces of marijuana - thus himself becoming guilty of 'obstruction of justice.' Would it not be preposterous to think that any of this is what the Framers meant when they referred to 'Treason, Bribery, and other High Crimes and Misdemeanors,' or that any sensible constitutional plan would make a president removable on such grounds?"

Thus, Congress had established a standard to apply when faced with the grave responsibility of considering impeachment of the President. However, in 1998 we got off on the wrong foot and, though some of us tried to correct course, we never got it right.

It is unfortunate that Independent Counsel Kenneth Starr did not proceed as cautiously as did Watergate Special Prosecutor Leon Jaworski. When Jaworski forwarded grand jury material to the Congress relating to President Nixon, he didn't stage a press event. In fact, in 1974 no material forwarded to the Judiciary Committee was made public until the committee and the President had a chance to review it. Former Watergate prosecutor Richard Ben-Veniste advised some Members of the Committee in September that the only thing Jaworski sent with the grand jury material was an index; and that index and most of the grand jury material referenced in that index have remained secret to this day.

When we got Starr's Referral, I believed that, at a minimum, we should have read what it said, and discussed it, before we released it to the nation. Instead, we released the Referral and this was followed in fast succession by thousands of pages of additional material that the nation need not have seen. We justified this wholesale release by insisting that the people had a right to know, presumably so they could be persuaded by the facts and constitutional standard as to what was the right course to follow.

From the outset, I subscribed to what several of the members called, "a yardstick of fairness," by which we would measure the conduct of the Committee. Our best yardstick of fairness was our historical experience. We had to compare the procedures we used today with what Congress did a generation ago, when a Republican President was investigated by a Democratic House. Because of the thorough, deliberative procedures used during the Watergate proceedings the

ultimate result was not only fair but was perceived to be fair. If we failed to follow this example, I was concerned that we would abdicate the solemn duty that the Constitution had entrusted to us and to us alone. If we fell short of that yardstick of fairness, the American people would correctly see the cause as partisan. I said in the beginning that the damage would be to our country and to our system of government.

While our system of government is based on openness, we repeatedly hid behind closed doors to conduct our business. The House Judiciary Committee met to decide what salacious material to make public but for the most part instead engaged in spirited debate about the Constitution, fairness, our country, and our future. All motions made to open the meeting or to release the transcripts of executive sessions were voted down by the Republican majority.

How ironic that the public was barred from knowing what Committee members said about the Constitution and due process while we deluged that same public with lurid materials in the name of openness and informing the public's discretion.

We should have spent more time reading what George Mason and James Madison said to each other than what Ms. Lewinsky and Ms. Tripp said to each other.

The Minority members co-sponsored a proposal that would have been fair, limited in scope and time, and logical, starting with a consideration of the impeachment standard and whether any of the allegations forwarded by the Independent Counsel met that standard. If we needed more time, for any reason, the Committee could ask for more time. If the Independent Counsel sent another Referral, the Committee could consider it consistent with the statute. I am proud to have played a key role in the development of the "fairness alternative."

The Majority, however, preferred instead an open-ended investigation without any deadline at all. The Democratic Minority preferred a prompt and fair inquiry. The Committee and the House were to split on party lines.

On October 8, 1998, I rose on the floor of the House in opposition to any unfair impeachment inquiry, and said,

"I fear what Alexander Hamilton warned against in [the] Federalist ... [that] 'there will always be the greatest danger that the decision [to impeach] will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt.'"

I said, "the question is not whether the President's misconduct was bad. We all know that the President's misconduct was bad. The question is, are we going to punish America instead of him for misconduct? Are we going to trash our Constitution because of his misconduct?"

Since that day we have not heard a single fact witness in Committee, either in public or executive session, although there is no question there are many conflicts in the hearsay documentation provided us by the Independent Counsel. One example of the many conflicts in the evidence is who, if anyone, told whom to get what gifts for what reason. The President has a quite credible explanation that he would not be telling someone to conceal the gifts he gave her -- even as he was giving her more gifts. There is only one way to resolve such conflicts, if indeed the facts are material to our inquiry, and that is to question the witnesses. However, we questioned no one with direct knowledge of any of the facts.

Under the circumstances, I have had to compare the evidence that can be gleaned of the President's tawdry affair and cover-up with the Majority's recommended resolution, that we remove him from Office. My conclusion, in reliance on constitutional standards, is that we have clearly lost all sense of proportion. These Articles of impeachment do not comport with the standard set by our Founding Fathers. They did not mean for us to remove a president for lying about private sexual misconduct, especially when we can prosecute him -- if he has committed a crime -- when he leaves office.

We do not condone the President's behavior -- but impeachment is not the remedy for bad behavior. For that we have courts. If those who seek to hound the President from office believe they have a criminal case against him, then let him pay the penalty of a conviction after he leaves office, if they can get a jury to agree. That is our system of dealing with all but "high crimes and misdemeanors".

Our task has not been made any easier by the way the Majority wrote these

Articles. The Committee majority refused to state the specific perjurious statements by which they would have us judge the President. This solemn occasion demands perfect clarity and at least the same due process which would be granted to any person accused of a crime. But the Congress, and the President, are left to guess about the exact nature of what he is supposed to have done wrong.

My friends, neighbors, and even complete strangers approach me in my District to tell me what they think is going on. They call this is a coup d'etat. They say that a runaway majority of the House of Representatives seems bent on overturning the result of a democratic election, because they don't like the result.

It is significant that the people we represent were not persuaded that the Majority was doing the right thing. I believe in the American people, and their views on this have been remarkably steady. The opinion of the people may not be determinative of the issue, but it is certainly relevant when we propose to overturn the last two national elections.

When I questioned the fairness of the proceedings in September, the Chairman commended an article by Professors Edwin Firmage and R. Collin Mangrum from the 1974 Duke Law Journal, starting at page 1023, and titled, "Removal of the President." At pages 1044 and 1045, the Professors explained that the public's opinion matters so that Congress' action may be legitimate and perceived as legitimate:

"The legitimacy of a democratic government must be established in the minds of the people; thus, if a transfer of presidential power is to be accomplished by ... removal ... in the face of impeachment, the legitimacy of the new administration can only be assured by public recognition that the previous mandate has clearly expired."

This same article, at page 1029, states that the impeachment process, while "fundamentally political," was "designed to protect the foundation of the state itself - not to create a sanction for misjudgment or to settle disputes over policy, both appropriately dealt with through the electoral process."

I am troubled that we have endangered the legitimacy by which we govern this nation. We lost our way in the Committee. I hope we may find it when we

reach the floor of the House. I hope and trust that the views of the people will inform the judgment of my colleagues before they vote this week. The people say what they think and they vote accordingly. I hope my colleagues may be free to do the same.

In this regard, I sincerely believe we should be permitted to consider censure. There is no constitutional prohibition against it. It has been used to some historical effect to rebuke other Presidents, particularly President Andrew Jackson. The Majority has supported such resolutions on a variety of other issues. Thus, we must ask ourselves why they have ruthlessly prevented a floor vote on the alternative of censure as the appropriate sanction. In doing so, the Majority has effectively disenfranchised those members of both parties, like myself, who feel that rebuke and condemnation is appropriate but impeachment is not.

Taking another backward glance, I have to say that, unlike my experience as a staffer during the 1974 impeachment proceedings, I can't say that the men and women I've observed in these proceedings have overcome party differences and loyalties in order to do what was fair and right in the interest of the nation. If courage is a rare flower this wintry season, as some suggest, this Congress shall likely become a humiliating object lesson for unborn historians to describe how this legislative assembly, riven by partisan differences, compromised rather than preserved the Republic.

The Constitution provides impeachment to protect America from subversion of the Constitution. How ironic that, in this instance, it is Congress' political misuse of impeachment that threatens our Constitution, rather than the tawdry misconduct of the Chief Executive.

If the House votes to impeach, and unless voters engage in massive punishment of the Republican perpetrators, it is inevitable that impeachment will become the routine tool of the losing party. They will seek to win in the House what they cannot gain in the polling booth. Our country will lose much that has made it strong in that process. I am deeply troubled and saddened that the Republican party would inflict such injury to our country to achieve this short term political goal.